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[*Wallace v. Tennessee Valley Authority*](#), 88-ERA-41 (ALJ May 14, 1990)

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U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, Ohio 45202

Date: May 14, 1990
CASE NO. 88-ERA-41

In the Matter of

WALTER H. WALLACE
Complainant

v.

TENNESSEE VALLEY AUTHORITY
Respondent

APPEARANCES:

W. P. Boone Dougherty, Esq.
For the Complainant

Thomas F. Fine, Esq.
For the Respondent

BEFORE: ROBERT L. HILLYARD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises from a complaint filed by the Complainant, Walter H. Wallace [hereinafter Wallace or Complainant] against the Respondent, Tennessee Valley Authority (hereinafter

TVA) pursuant to section 210 of the Energy Reorganization Act of 1974 [hereinafter ERA or the Act] (42 USC section 5851) and the implementing regulations (29 CFR Part 24). Following attempts at informal resolution of the complaints, the matter was referred to the Office of Administrative Law Judges by the Administrator of the Wage and Hour Division, Employment Standards Administration, for formal hearing.

A formal hearing in this case was held in Knoxville, Tennessee on March 15, 1989. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder. The findings and conclusions which follow are based upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. STATEMENT OF THE CASE

Walter H. Wallace filed a complaint with the Wage and Hour Division, Employment Standards Administration on May 6, 1988 in which he alleged that he had been discriminated against with respect to the compensation, terms, conditions, and privileges of his employment. He said that this arose in July 1987 as a result of a meeting regarding a particular nuclear safety concern and the preparation of Nonconforming Condition Reports (ALJX 1).¹ He filed a second complaint with the Employment Standards Division July 25, 1988. This complaint alleged that TVA had discriminated against him with respect to a Reduction in Force [RIF] lay-off. He stated that the reasons given for his termination were not accurate and that he was more highly qualified for continued employment at TVA's Watts Barr Nuclear Power Plant than the employees who were retained (ALJX 2).

The Area Director of the Wage and Hour Division conducted an investigation of the complaints. When it was determined that an agreement of settlement was not possible, the Area Director, on September 19, 1988, issued a decision in favor of the Complainant (ALJX 3). The Respondent took a timely appeal from that decision to the Office of Administrative Law Judges (ALJX 4).

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II. ISSUES

Whether the action taken against Walter Wallace with a resulting termination of his employment, effective September 30, 1988, was the direct result of the reporting by Wallace of nuclear safety concerns to the Nuclear Regulatory Commission in violation of the Energy Reorganization Act (Tr. 7).

III. STIPULATIONS

The parties stipulated to the following and I find these stipulations supported by the evidence of record (ALJX 15):

1. Complainant was an employee of TVA and that TVA is an employer covered by the Act.

2. Complainant is an electrical engineer with a Bachelor of Science degree in Electrical Engineering.

3. TVA has a number of different pay schedules for its white-collar work force. The schedules which may be pertinent to this proceeding are as follows: SB, Clerical and General Services; SC, Engineering, Chemical, and Computer Systems; SE, Aide and Technician; and M, Management and Specialist. Each pay schedule is divided into a number of pay grades. For example, SC has 4 pay grades, while M has 13 pay grades. As a general rule, the higher the grade level, the higher the pay rate.

4. Complainant worked as an electrical engineer for the Tennessee Valley Authority (TVA) from 1968 until 1976, when he resigned. He returned to work for TVA as an electrical engineer in May 1985. In October 1985 he was selected as the Power Plant Maintenance Supervisor, M-5, at TVA's Shawnee Fossil Steam Plant in the Office of Power.

5. Effective March 3, 1986, Mr. Wallace became a Supervisor, M-5, of the Electrical Engineering Unit-B (EEU-B) at TVA's Watts Bar Nuclear Plant (Watts Bar) in what was then known as the Office of Construction. This was a lateral transfer from the position he held at the Shawnee Fossil Steam Plant except that he was placed on a supervisory differential, known as impact pay, due to the pay rate received by several of his subordinates and so received more pay.

6. Impact pay at TVA is used at management's discretion

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when a supervisor's annual salary is less than the annual salary received by at least one of the supervisor's subordinates. Impact pay is to be removed immediately when the reasons for impact pay no longer exists.

7. Complainant reported to Jerry Cofield, Assistant Construction Engineer, who reported to Floyd Smith, Construction Engineer. Mr. Smith reported to the Construction Manager at Watts Bar. From February 1986 until January 1988, the Construction Manager reported directly to the Director of Construction. From August 1986 until February 1988, Robert A. Pedde served as Acting Director of Construction. The Construction Manager also reported indirectly on a "dotted-line" or "matrix" basis to the Project Manager at Watts Bar. Mr. Pedde served as Project Manager from February 1986 until January 1988. From January 1988 until May 1988, he served as Deputy Site Director at Watts Bar. In May 1988, he became Watts Bar Site Director. In January 1988, the Construction Manager reported directly to the Vice President of Nuclear

Construction, while the Site Director assumed the same role vis a vis the Construction Manager as had been previously filled by the Project Manager.

8. While in the position of Supervisor, EEU-B, Complainant received two performance appraisals, known as the Management Appraisal Summary, or MAS. On December 9, 1986, Complainant received the rating of "solid performer" on his MAS for the period from October 1, 1985 to September 30, 1986. On December 4, 1987, he received the same rating on his MAS for the period October 1, 1986 to October 1, 1987. The rating of "solid performer" is deemed to be a good rating at TVA.

9. In or around July 1987, Complainant attended a meeting with other TVA employees at Watts Bar. He had a disagreement with another TVA employee about compliance with procedures. A disagreement and discussion occurred between Complainant and Robert Nabors about the Nuclear Regulatory Commission's position concerning whether the Modifications Group was following proper procedures.

10. Mr. Pedde, who was then the Watts Bar Project Manager, heard about the disagreement and telephoned David Lake, Construction Manager, asking him to look into the matter. Mr. Lake did so at a meeting attended by Complainant and Cofield and possibly others.

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11. Watts Bar was reorganized in late 1987 and early 1988. As part of this reorganization, Complainant was transferred laterally to the new position of Electrical Task Engineer, M-5, under John Porch, the Watts Bar Construction Superintendent. Complainant contends that he was removed from his position prior to his selection as Electrical Task Engineer. This is disputed by TVA. This transfer was officially effective on February 15, 1988. Complainant was not assigned an SC-4 engineer and was no longer eligible for impact pay as of February 29, 1988.

12. Two other task engineer positions were also created and filled at this time.

13. On May 6, 1988, Complainant first wrote the Department of Labor, complaining about his FY 1987 MAS rating, his February 1988 transfer, and his loss of impact pay.

14. Due to a claimed lack of work, all three task engineers, including Complainant, were loaned back to the Construction Engineer. Complainant was loaned back to the Electrical Engineering Unit.

15. On July 22, 1988, Complainant wrote to the Department of Labor complaining about his pending termination through a reduction in force (RIF) due to the alleged elimination of his task engineer position.

16. Complainant was officially notified of his RIF on August 1, 1988 with an effective date of September 30, 1988. He applied on at least five vacancy announcements for M-5 and M-6 positions being created at Watts Bar as part of another reorganization. He was not selected for any of these positions.

17. Complainant made timely contact with the Department of Labor about his termination.

IV. FINDING OF FACTS

1. Mr. Wallace received a degree in electrical engineering from Tennessee Technical University in 1962. On the date of the hearing he was 55 years of age (Tr. 9). He started working at a TVA plant in 1968 and worked for TVA continuously until 1976. During this period he worked as an electrical engineer at various fossil fuel steam electric generating plants. Complainant

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resigned his position with TVA in 1976 when he was transferred to the Sequoyah Nuclear Plant. He had established a hardware store and farm in central Tennessee and rather than transfer to Sequoyah, he went into the hardware business full time (Tr. 11-12).

2. In 1980, Mr. Wallace resumed his profession as an electrical engineer for Georgia Power at Plant Vogtle Nuclear generating plant. He returned to employment with TVA in 1986 when he was invited to work at its Bellefonte Nuclear Plant where he served as a lead engineer (Tr. 11, 16). He subsequently transferred to a plant in Chattanooga, Tennessee and then to a fossil fuel plant near Paducah, Kentucky (Tr. 20, 22). Mr. Wallace transferred to the Watts Bar Nuclear Plant on February 17, 1986 (Tr. 22).

3. TVA is an employer as defined under the Act and regulations. It owns the Watts Bar Nuclear facility located on the Tennessee River near Spring City, Tennessee. Watts Bar was designed and constructed to generate electrical power from two nuclear reactors, Unit 1 and Unit 2. In February, 1986 the construction phase of Unit 1 was complete while construction continued on Unit 2 (Tr. 24). At that time, management of the plant was separated into two groups, construction and modification (Tr. 380). The modification group was responsible for work being performed on Unit 1 and the construction group was responsible for work being performed on Unit 2 (Tr. 380-381). A reorganization of plant management became effective in February, 1988 whereby the modification and construction groups were combined into one management group known as construction (Tr. 506-508; RX 10). Another reorganization of management became effective September 15, 1988 (Tr. 405).

4. Under the relevant Watts Bar management structure the Complainant reported to the Assistant Construction Engineer, Cofield who reported to the Construction Engineer, Floyd Smith. Mr. Smith reported to the Construction Manager, which position was held

by Mr. Lake until July, 1987 at which time Jim Thompson assumed the responsibilities of that position. The construction manager reported to the project manager, Mr. Pedde. In the reorganization of February 1988, Mr. Pedde became the Deputy Site Director and then in May 1988, he became the Site Director. Following that reorganization, the construction manager, Mr. Thompson, reported to the Vice President nuclear construction,

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Willie Brown. The Vice President's position, was known before the February 1988 reorganization as the Director of Nuclear Construction and was held by Mr. Brown. Following the reorganization, the Site Director's position was the same, except by name, as the previous project manager's position (ALJX 15; Tr. 34, 158-159, 301, 305).

5. TVA established a system for determining employee salaries based on four schedules ranging from SC-clerical to M-management and specialist. Each pay schedule is composed of several pay grades (ALJX 15) Employees scheduled under the M and S categories may be entitled, at the discretion of the division director, to Supervisory differential pay, also known as "impact pay." Managerial employees received "impact pay" if their salary was equal to or less than employees under their supervision (ALJX 8; Tr. 394). "Impact pay" was eliminated from the pay schedule effective in August 1988 (Tr. 397).

6. TVA utilized an employee performance appraisal system to determine annual merit pay increases known as a Management Appraisal Summary. Under this system an employee's performance was rated on a five level scale from the lowest to the highest being, Unsatisfactory (U), Adequate (A), Solid Performer (SP), Superior (S) and the highest rating, Exceptional (E). The average or middle rating was that of Solid Performer (SP). TVA considered an individual with a rating of Solid Performer to be a good employee. The Complainant received two performance appraisals during his tenure with TVA Watts Bar and received the rating of Solid Performer on both appraisals (ALJX 15 par. 7; CX 6; RX 3).

7. On March 3, 1986 Complainant was appointed to the position of Supervisor over Electrical Engineering Unit-B (previously Unit-C) [hereinafter EEU-B]. This position was classified on the salary schedule as M-5 which was the same position which the Complainant held before transferring to Watts Bar (ALJX 15 par. 4). The job description for this position required the Complainant to, *inter alia*, supervise the EEU with responsibility for all field engineering work related to the installation of nuclear power plant components; inspection, testing and quality control of installations; and, maintenance of quality assurance aspects of nuclear plant construction (CX 5). He was also required to "Ensue open and professional communications with the Nuclear Regulatory Commission site resident inspectors" (CX 2). In fact,

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Mr. Wallace was designated as a secondary contact for the NRC resident inspector for electrical issues (CX 1). In this position he supervised 20 to 30 people of which one-third were graduate engineers and the remaining were engineer associates (Tr. 31). He also supervised Eugene Douglas and David Reed, both SC-4 engineers, who earned higher pay than Wallace at the M-S rate. Therefore, the Complainant received "impact pay" of \$6,626.00 (RX 1).

8. Part of Complainant's job involved maintaining the quality assurance aspects of the nuclear facility which required him to prepare reports that detailed particular problems effecting the quality and safety of a nuclear power plant. These reports are known as Conditions Adverse to Quality Reports (CAQR's), Non-Conformance Reports (NCR's) and Significant Condition Reports (SCR's) (Tr. 30; CX 4). During the time Mr. Wallace held the position of supervisor of EEU-B his group identified approximately 22 NCR's and CAQR's (Tr. 42). The EEU groups were assigned the task of identifying the NCR's, devising, corrective measures, writing plans to correct the problems and scoping the man hours necessary to accomplish the correction plans. (Tr. 43, 204; See, CX 3). Many other units or groups at Watts Bar were also responsible for identifying and preparing CAQRs and NCRs (Tr. 386) Correction of NCR's and CAQR's must be completed before a plant can be licensed (Tr. 204).

9. Thomas Powell was an inspector with the Nuclear Regulatory Commission. He was assigned to the Watts Bar office by the NRC to work on the final inspection of the plant before licensing. He did most of the electrical inspection on the construction phase. While working at Watts Bar, Mr. Powell had many meetings with the Complainant and made it a habit to meet with him at least once per quarter in order to monitor the Construction Electrical area because he felt that the Complainant better understood the NRC's role at the plant. There were also times when Mr. Powell met with Mr. Wallace more frequently (Tr. 190-194).

10. During the spring or early summer of 1987, and before July 1987, a stop work order was issued to prevent further issuance of electric cable or wire at Watts Bar due to a problem regarding identification of the cable reels being removed from the construction warehouse. The question was one of traceability of installed wire to cable reels (Tr. 65, 161, 209-210, 263).

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11. In July, 1987, a meeting took place between a group from the modification unit and a group from the electrical engineering unit (hereinafter Cable meeting). The Complainant attended this meeting along with Phillip Perry. It was also attended by approximately ten other people, primarily from the modification unit, including Robert Nabors and Tommy Kirkpatrick. There was no representative present from the NRC. The meeting focused on whether the modification unit could obtain cable that was subject to

the hold order. At this meeting a somewhat heated discussion occurred between Mr. Wallace and Mr. Nabors regarding a commitment made by the construction and modification groups to the NRC regarding the traceability of cable. The Complainant made a statement to the effect that the NRC does not approve of the manner in which the modification group handles the cable and prefers the method used by the construction unit (Tr. 67-68; 262-264).

12. Enroute to the Cable meeting, Mr. Wallace and Mr. Perry had a chance encounter with Mr. Powell, the resident NRC inspector. The conversation between Mr. Powell and Mr. Wallace related to retest procedures followed by the modification group and a computer program used by the construction group (Tr. 196-198).

13. After the Cable meeting, Mr. Kirkpatrick informed Mr. Pedde that Mr. Wallace and Mr. Nabors had engaged in a heated discussion regarding the preferences of the NRC regarding the management and traceability of cable (Tr. 412).

14. Following the Cable meeting, Mr. Wallace and Mr. Perry were stopped by Mr. Cofield as they returned to their offices. Mr. Cofield stated that Mr. Lake, the construction manager, wished to see them in his office immediately. Mr. Cofield was informed of this second meeting by Smith who requested that he bring the Complainant with him to Mr. Lake's office.

15. When the Complainant arrived, Mr. Lake was on the phone with a party whom he identified as Mr. Pedde, project manager. Mr. Lake related that the substance of his conversation with Mr. Pedde involved the Cable meeting. Mr. Pedde had voiced concern about unprofessional behavior by Mr. Wallace at the meeting and requested that Mr. Lake conduct an investigation into what had occurred at the meeting and to take disciplinary action against Mr. Wallace, if warranted (Tr. 69-72, 165, 211-217, 265-267, 384).

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16. During the meeting in Mr. Lake's office, Mr. Wallace excused himself to return to his office in order to obtain documents that supported his position (Tr. 71, 217).

17. Mr. Lake and Mr. Pedde testified that the confrontation between Mr. Wallace and Mr. Nabors raised concern over the issue of whether the Complainant had acted unprofessionally and honestly during the Cable meeting (Tr. 165-167, 383-384). Mr. Pedde was also concerned about the ability of the modification and construction groups to work together (Tr. 215-217). Mr. Lake investigated the situation and advised Mr. Pedde that the issue had been resolved and told Mr. Wallace that he had taken care of the matter (Tr. 73, 384).

18. In December 1987 and January 1988, Watts Bar management, coordinated by Floyd Smith, was preparing to reorganize Watts Barr to combine the modification and

construction units (Tr. 504; ALJX 15 par. 10) As a result of combining the two units, an increased work load for the electrical engineering units was envisioned. Three electrical engineering units were created under the new organizational structure (Tr. 506).

19. During the latter days of 1987, and during an informal discussion between Mr. Thompson, Mr. Smith and Mr. Pedde, the latter remarked that he felt the construction electrical engineering units were very weak. He based his opinion on his observations and consultation with Brian McCullough, previous division director. Mr. Pedde suggested hiring people from outside of TVA to help bolster the industry experience of those units (Tr. 308, 388-89). Also during this meeting Mr. Pedde stated that he was concerned about Mr. Wallace because he believed that Mr. Wallace had lied in a prior meeting (Tr. 309, 389, 406).

20. Mr. Pedde told Mr. Smith, in the latter part of 1987, that he thought Mr. Wallace had provided false information during a production meeting and did not have confidence in him. Mr. Pedde said that he sat next to Complainant during a production meeting (which took place sometime prior to the Cable meeting). He read Mr. Wallace's report and noted a difference between Mr. Wallace's statements and that which was reflected on his report. He later related this in a meeting with Mr. Thompson and Mr. Smith and again in a meeting held in response to Wallace's Employee Concerns. Mr. Pedde told Mr. Smith that he wanted more experience in the Electrical Engineering area and that he did not

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have confidence in Mr. Wallace because he had provided false information (Tr. 389-391; 406-407).

21. Jerry Cofield, Wallace's immediate supervisor, expressed his belief that the Complainant was a competent electrical engineer and was a competent administrator who had built EEU-B into a close and strong unit (Tr. 207, 225).

22. During the reorganization that occurred in February 1988, Mr. Wallace, Frank Bagamary, the Supervisor of Construction EEU-A, and Ann Harris were removed from their positions. Mr. Cofield chose to inform them of their removal in person which he did in early 1988 (ALJX 15 par. 10, 11; Tr. 222-225). The reason given by Mr. Smith for the removal of Mr. Bagamary and Mr. Wallace was that the electrical engineer units were not performing as well as other units and specifically that they were identifying more NCR's than they were fixing (Tr. 78, 224, 281, 335).

23. Mr. Kirkpatrick was named as the assistant Construction Engineer, a position supervised by Mr. Smith, in the January 1988 reorganization (RX 10). As assistant Construction Engineer, Mr. Kirkpatrick chose the three persons who would fill the electrical engineering unit supervisor positions (Tr. 507). He chose Mr. Hammati-Arass, a new employee to TVA, Mr. Bagamary and Ron Shanks (RX 10; Tr. 365).

24. Jerry Cofield was moved from his position as assistant construction electrical engineer to that of assistant construction civil and mechanical engineer (RX 10).

25. Mr. Porch was named General Construction Superintendent in the February 1988 reorganization. He supervised a number of assistant construction superintendent positions as well as engineering task engineers (RX 10). The latter were newly created positions intended to work closely with the craft personnel in order to track progress of the work (Tr. 561). Mr. Porch was given the responsibility of choosing three engineers to fill the positions. At the urging of Mr. Cofield and Mr. Thompson, Mr. Porch chose Mr. Wallace to fill the Electrical Task engineer position (RX 10; Tr. 561-563).

26. The task engineer positions were considered an M-5 pay schedule grade, the same rank as Wallace, had held as EEU-B supervisor (RX 10).

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27. The transfer to the position of task engineer became effective on February 15, 1988. Mr. Wallace was not assigned an SC-4 engineer to supervise and, therefore, he lost eligibility to "impact pay" effective February 29, 1988 (RX 9; ALJX 15 par. 10). As a result of the loss of "impact pay" Mr. Wallace's salary dropped \$6,527 from \$54,646 to \$48,119 per annum (RX 9). Mr. Porch did attempt to acquire a good quality SC-4 engineer to assist Mr. Wallace, but his request was denied by Mr. Thompson and Mr. Smith for the reason that there were no SC-4 engineers available because they were on loan to Sequoyah and Brown Ferry Nuclear facilities (Tr. 590).

28. As originally envisioned, the task engineers positions were intended to hold significant responsibility. However, the anticipated work never developed due to a "downsizing" of the project and the loaning of employees to the Sequoyah Nuclear facility. Eventually, all task engineers were loaned back to the engineering supervisory units (ALJX 15 par. 13; Tr. 561-567, 576). The position of Task Engineer was eliminated in a subsequent reorganization (Tr. 569).

29. After Mr. Wallace was assigned/loaned back to the Electrical Engineer supervisor group in the spring of 1988, he was assigned the task of developing a logic to coordinate all modification and construction electrical issues. This assignment involved scheduling the CAQRs and NCRs into a P-2 computer system. While important, the task could not be fully performed by one person. Mr. Wallace was never assigned anyone to assist him in developing this program (Tr. 342-43, 524-26).

30. During the time Mr. Wallace was reassigned to the electrical engineering unit he was given a small cubicle in the rear of the office area and eventually was given office space in a storage room (Tr. 100-103).

31. Following the February 1988 reorganization, work at Watts Bar slowed and TVA placed priority on work then being performed at Sequoyah. Due to the transfer of people

to Sequoyah the work of the electrical engineering unit was disorganized. Very little work was going on in the electrical engineering unit and "[e]verything was in an uproar" (Tr. 567, 644).

32. During the summer months of 1988, Watts Bar underwent a second major management reorganization. This reorganization

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resulted in the use of an area manager concept and in the elimination or reclassification of M-5 electrical engineers and M-5 task engineers (Tr. 405, 569; RX 11).

33. During June 1988, and during the planning for the second reorganization, Mr. McCullough, who had been hired by TVA on contract from Bechtel to advise Mr. Pedde, met with Mr. Thompson regarding Mr. Wallace. Mr. McCullough advised Mr. Thompson that he was of the opinion that the electrical engineer units had not given Mr. Wallace a sufficient amount of work to keep him busy. He stated that if Mr. Wallace and Mrs. Harris were given more work then they would not have enough time to file complaints with the Department of Labor (Tr. 310). In further discussions Mr. McCullough told Mr. Thompson that he had been advised by TVA lawyers that employees which management did not want, like Mr. Wallace, could be eliminated in a reorganization (Tr. 311).

34. Mr. Wallace received a Reduction in Force memorandum dated August 1, 1988 that identified his termination date as September 30, 1988. The reason for the lay off cited in the memorandum was shortage of funds (RX 7).

35. Following receipt of the Reduction in Force memorandum, Mr. Wallace applied for at least five vacancies announced at Watts Bar. He was not selected for any of those positions (ALJX 15 par. 15). The reason given for his nonselection for announcement number 0572 was because the recommending group, which included Steven Stagnolia and Mr. Porch, felt that he did not have the necessary experience; as for announcement number 0573, the reason given was that more highly qualified persons applied. There were three vacancies under announcement number 0574. The reason given for his nonselection for any of these three positions was that they were filled by the use of an objective test that utilized a points system for the various qualifications and Mr. Wallace finished with the seventh highest point total for three positions (Tr. 604, 606; CX 8; RX 12).

36. Mr. Wallace had not obtained employment prior to the hearing of this matter.

V. CONCLUSIONS OF LAW

The basis of this action is the August 1, 1988 reduction in force memorandum with the subsequent September 30, 1988

termination of employment (Tr. 7; FF. 34). While there was an alleged earlier discriminatory job action which became effective on February 15, 1988, the Complainant is not arguing for relief due to this action. He bases his claim on the September 30, 1988 RIF. Moreover, any relief based on the February 15, 1988 job action would be barred by the statute of limitations because the complaint was not filed until more than thirty days after the date that the Complainant learned of the alleged discriminatory act (Tr. 222-225).

Twenty-nine C.F.R. section 24.3(b) provides that any complaint shall be filed within 30 days after the occurrence of the alleged violation. The statute of limitations begins to run on the date the Complainant becomes aware that his employer plans to take a discriminatory job action against him and not on the date when the discriminatory action becomes effective or the consequences are felt. *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Lippert v. General Electric Co.*, 27 FEP Cases 1427 (W.D. Ky. 1982). The Complainant filed a second complaint with the Department of Labor on July 22, 1988, alleging a violation of Section 210 of the Energy Reorganization Act of 1974. 42 U.S.C. section 5851. This complaint was timely filed within 30 days from June 29, 1988, the date Mr. Wallace learned that he would be laid off due to a reduction in force and reorganization. Complainant was officially notified of his RIF on August 1, 1988 (ALJX 2; 15, par. 16; Tr. 7; Resp. Brief p. 9). Therefore, the issues raised in that complaint are timely filed.

In order for Complainant to succeed in his action, the evidence must establish:

1. That TVA is an employer subject to the Act;
2. that he was discharged or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment; and,
3. that the alleged discrimination arose because the employee participated in activity protected under the Act.

DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983).

The parties have stipulated and I have found that TVA is an

employer covered by the Act. The parties do not dispute that the Complainant was discharged from employment with TVA effective September 30, 1988.

That leaves the remaining issues of (1) whether the discharge was discriminatory and (2) whether it was motivated by the Complainant's participation in protected activity.

It must be determined whether the discharge of the plaintiff was due to a reduction in force or if the reduction in force was merely a pretext for the discharge. Under the "dual motive"² test, the Complainant bears the initial burden of establishing that his protected conduct was a substantial or Motivating factor in the adverse job action. The Complainant meets his burden through presenting a prima facie case as described in *DeFord v. Secretary of Labor*, 700 F.2d at 286, and set out above. The burden then shifts to the employer to show that the employee would have been discharged regardless of the protected activity. *NRLB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The evidence establishes that the Complainant engaged in the preparation of internal safety reports known as NRC's and CAQR's. The Watts Bar management was aware of this activity as this was a significant part of his assigned duties (FF. 8). The courts have ruled that the preparation and filing of internal complaints does constitute protected activity under the Act. *Mackowiak v. University Nuclear System, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985); *Consolidated Edison Co. of New York, Inc. v. Donovan*, 673 F.2d 61 (2nd. Cir. 1981); and, *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974). These courts reasoned that the Acts are remedial in nature and, therefore, require a liberal construction of their terms. Because of the Act's remedial nature, the courts have broadly construed the definition of protected activity to encompass any activity that furthers enforcement of the Act.

TVA showed concern with the fact that Mr. Wallace had filed a previous complaint of discrimination with the Department of Labor (See FF. 22, 33). Given the broad definition of protected activity approved by the courts, the Complainant's filing of a complaint of discrimination with the Department of Labor is within the category of a protected activity. The ability to file a

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complaint alleging a discriminatory job action ultimately permits employees to report safety concerns to their employers or the NRC. Absent the right to seek redress for adverse job actions, the fear of reprisal from an employer would chill an employee's willingness to report violations of the Acts and Regulations to their employers or the NRC. In recognition of this chilling effect, Congress granted to employees the cause of action for wrongful discharge, or other adverse job actions, motivated by discrimination.

The preparation of internal safety reports by the Complainant constitutes protected activity. Additionally, the filing of a complaint of discrimination with the Department of Labor is an integral and essential part of the regulatory scheme and also constitutes protected activity under the Act.

The evidence supports a finding that TVA's decision to discharge the Complainant was motivated by his engaging in protected activity. Specifically, Mr. McCullough, an adviser to Watts Bar management, suggested to Mr. Thompson, construction manager, that TVA

could use a reorganization to eliminate employees like the Complainant, that it did not want (FF. 33). This suggestion followed on the heels of a discussion between Mr. McCullough and Mr. Thompson in which Mr. McCullough stated that Mr. Thompson should keep Mr. Wallace busier in order to prevent him from filing complaints with the Department of Labor (FF. 33). This testimony is uncontradicted. This evidence that the discharge of Mr. Wallace was motivated by his engaging in protected activity is sufficient to establish a prima facie case of discrimination in violation of section 210 of the Act. *See, Hagelthorn v. Kennecott Corp.*, 710 F.2d 76 (2d. Cir. 1983).

TVA defends its action of discharging Mr. Wallace on the grounds that he was discharged as the result of a major reorganization and reduction in force that resulted in the elimination of M-5 engineer positions. However, according to the organization charts presented by TVA at the hearing, the "reorganized" structure makes use of several M-5 engineers as engineering supervisors, a position TVA did not distinguish from the EEU supervisors under its previous organization. Moreover, TVA retained engineers who had held the position of supervising engineer at the M-5 schedule under the old organization structure in the title of supervising engineer at the M-5 schedule. Most notably, TVA retained Hermati-Arass as supervisor of engineering in AREA C at pay schedule M-5 (RX 10, 11) Mr. Hermati-Arass

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replaced the Complainant as EEU-B supervisor in February or March 1988 (Tr. 92).

The evidence shows that Mr. Pedde demonstrated a desire to get rid of the Complainant and used his position and influence to make his feelings known to others under his supervision. Mr. Pedde told Mr. Lake to take action against the person charged with creating a disturbance at the Cable Meeting. Mr. Pedde told Mr. Thompson and Mr. Smith that he did not have confidence in Mr. Wallace because he had given false information at a production meeting (FF. 19, 20). While he initially could not remember who he told and whether he used the term "lied" he later admitted that he used this term or its equivalent. He never asked Mr. Wallace about these accusations to determine if they had some substance or were a misunderstanding. Mr. Pedde told Mr. Gentry, an investigator with Employees Concerns at TVA, that he did not remember making such a statement. Later, on June 16, 1988, Mr. Pedde denied making such a statement when asked at a meeting with Mr. Wallace present (Tr. 632, 633).

TVA argues that Mr. Pedde admitted making this statement to the Complainant, to the DOL investigator and others (Resp. Brief. p. 13). However, the first communication that Mr. Pedde had with the Complainant about the "lying" incident was after the Complainant confronted Mr. Pedde and asked him about his statements to others that the Complainant had lied. This was after the Complainant had been loaned back to the Electrical Engineering Unit and had no work to do and shortly before his RIF (Tr. 117-118). Based upon testimony of the witnesses, the evidence of record and his demeanor at the hearing, including his rather evasive manner in responding to cross-examination, I

have generally given less weight to the testimony of Mr. Pedde when it conflicts with the testimony of others.

TVA appears to have pursued a pattern of action against the Complainant for the purpose of encouraging him to resign or to justify his eventual termination. The Complainant's job was changed after the first reorganization causing him to lose "impact pay" of over \$6,000. His responsibilities were gradually decreased and his office space was eventually reduced to a storage room. He was the only Task Engineer that was not assigned a SC-4 engineer (Tr. 108; FF 27). Mr. Wallace's last task involved scheduling the CAQRs and NCRs into a P-2 computer system. This task could not be performed by one person and he was never

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assigned anyone to assist him with the project (FF 29).

TVA argues, that Complainant's main contention is that Mr. Pedde and Mr. Smith wanted to get rid of him but that since neither Mr. Pedde nor Mr. Smith was involved in the selection process during the August 1988 reorganization, pretext cannot be shown. However, I find that Mr. Pedde influenced those under his supervision by his remarks and downgrading of the Complainant.

Additionally, the objective point system method used in filling the three openings is suspect for several reasons. The categories under Service Evaluation were divided into five areas and included a category for "Better than fully Adequate" which is a category not included on the annual rating form. Additionally, Mr. Hemmati-Arass had been recently hired by TVA and had not been employed for a long enough period to have a service evaluation. He was given the second highest point total under Service Evaluation points, thirty-nine points higher than Complainant. This was done on the basis of inquiries to his previous employer and his brief period of service with TVA. Mr. Cofield rated the Complainant as superior but was told by Mr. Smith to lower the rating to solid performer (Tr. 89). I find that the point rating system was subjective and could be manipulated to form a basis for termination of employment (RX 12; TR 617, 625-627).

Mr. Wallace was given good ratings at TVA and was well thought of by his immediate supervisor, Mr. Cofield (FF. 21; Stip. 8). According to the RIF notice given to Mr. Wallace, the reason for the reorganization was "shortage of funds" (FF. 33). TVA offered little or no evidence to establish any business reason as to why it was necessary to reorganize Watts Bar management for a second time within seven months or to discuss the shortage of funds and the necessity for elimination of certain jobs over others.

TVA has failed to rebut the prima facie case of discrimination presented by Mr. Wallace. TVA has failed to show a legitimate, non-discriminatory reason for the discharge of the Complainant and has failed to establish that he would have been

discharged regardless of the discriminatory reasons. Therefore, I find that TVA discharged Mr. Wallace in violation of Section 210 of the Act.

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VI. ATTORNEY'S FEES AND COSTS

In order to determine the amount of backpay, attorney fees, and other costs, the Complainant, through counsel, shall file, within 20 days of this Recommended Decision and Order, the following information with this Office with proof of service on the Respondent: 1) A documented list of all claimed backpay, damages and other costs which he is claiming by virtue of his termination of employment from TVA and, 2) A documented fee petition and bill of costs and, 3) A list of any income which would constitute offsets to the above.

Respondent will then have 20 days thereafter to file any comments and/or objections with this Office. Thereafter a supplemental Order for fees and costs will issue.

VII. RECOMMENDED ORDER

Accordingly, it is hereby recommended that an ORDER be issued by the Secretary of Labor providing that the Tennessee Valley Authority is to:

1. Restore Complainant to his position as an Electrical Task Engineer at the M-5 pay scale or to a comparable position with all compensation, terms, conditions and privileges of his employment;
2. Compensate Complainant for all salary lost due to his discharge on September 30, 1988, through the date of his reinstatement at the same grade and at the same rate of pay which he would have received if he had continued to employed and pay interest on the amount of backpay as provided in 28 U.S.C. 1961. Backpay awarded under this decision is to be offset by any post termination wages.
3. Cease all discrimination against Complainant in any manner with respect to his compensation, terms, conditions and privileges of employment because of any action protected by the Energy Reorganization Act and purge Complainant's personnel file of all references relative to his discharge on September 30, 1988;
4. Respondent shall pay to Complainant all costs and expenses, including attorney's fee, reasonably incurred in connection with the bringing of the complaint upon which this recommended order is issued, such as may be approved by the Secretary upon issuance of the Supplemental Recommended Decision and Order.

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ROBERT L. HILLYARD
Administrative Law Judge

[ENDNOTES]

¹ALJX refers to Administrative Law Judge Exhibits; CX refers to Claimant's Exhibits; RX refers to Respondent's Exhibits; FF refers to Findings of Fact; Stip. refers to Stipulation.

²*In re: Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *aff'd*, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the National Labor Relations Board established the test for determining if an employee had been discharged in violation of section 8(a)(3) or the National Labor Relations Act where the employer alleged discharge for cause due to disciplinary reasons. The Board distinguished the "dual motive discharge" from "pretextual discharge" on the basis that the latter dealt with discharge for business reasons. However, the burden shifting test adopted by the Board is substantially identical to the burden shifting test employed by the courts in "pretextual discharge" cases arising under the Age Discrimination in Employment Act, 29 U.S.C. section 601 *et seq*, and other civil rights acts cases. Both require the showing of a prima facie case that the act was discriminatory which shifts the burden to the employer to establish good cause for the discharge, at which time the burden of production returns to the claimant to show that the discharge was determinative factor. *Fite v. First Tennessee Production Credit Assoc.*, 861 F.2d 884, 890 (6th Cir. 1988). The "determination factor" test is analogous to the "motivating or substantial factor" test employed in *Wright Line*. The claimant bears the ultimate burden of persuasion. *Fite v. First Tennessee Production Credit Assoc.*, 861 F.2d at 889.